THE

ABOLITION OF ARREST

AND

IMPRISONMENT FOR DEBT

CONSIDERED IN

SIX LETTERS

ADDRESSED TO A CONSTITUENT.

BY

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ON THE

ABOLITION OF ARREST

AND

IMPRISONMENT FOR DEBT.

LETTER I.

SIR,

You have asked me for an explanation of my reasons for supporting, as I did, the Bill introduced by the Attorney-General, Sir John Campbell, for facilitating the recovery of debts,* and for the abolition of arrest and imprisonment for debt, except in cases of fraud. I have already stated these reasons at some length, and I now, relying on the judgment of some of my friends, venture to state them publicly, in the hope that I may be able, in some degree at least, to draw the attention of the

* "An Act for facilitating the Recovery of Debts, the Relief of Debtors willing to make cession of their Property for the Payment of their Debts, the Prevention of Frauds by Debtors, and abolishing Imprisonment for Debt, except in Cases of Fraud."

public to a subject of vast importance, and as interesting to individuals, as it is important to society at large.

" Excepting the laws for the support of Go-
" vernment and the maintenance of the poor,
" there does not appear to be any of more uni-
" versal concern than the laws between debtor
" and creditor. No man can buy or sell, borrow
" or lend, but he may have occasion to appeal to
" them; they are the laws that belong to every
" day's business, and equally concern every rank
" of the state."*

In this point of view therefore it will not, I hope, be considered presumption on my part to endeavour to revive attention to the present state of these laws; and in this point of view alone I hope these few observations will be considered. They are equally applicable to all, whether occupied only in the pursuits of private life, or devoted to the affairs of government. No statesman can view with indifference the effect of these laws on the national character, when the numbers they annually consign to our gaols are considered; and still less can the man of business be insensible to their practical operation. They most inadequately protect his property, and most im-

* " Considerations on the Laws between Debtor and Creditor, and an Abstract of the Insolvent Acts; with Thoughts on a Bill to enable Creditors to recover the Effects of their Debtors, and to abolish Imprisonment for Debt, 1779."

perfectly punish those who heedlessly or designedly invade it.

The question also is one, affecting the character of the man of business as well as his interests in trade, and is therefore very far from being a purely commercial one. It is any thing rather than a party question, and demands a discussion wholly free from party passions and party prejudices; and it may I hope be so considered without exciting the "heat and flame of that distemper" which is so destructive of the calm consideration of the various and great, though scarcely more important, political questions of the day.

That great lawyer and single-minded patriot, Sir Samuel Romilly, when in 1815 the Insolvent Act was under discussion, expressed his opinions on this subject as follows:—

"There is, perhaps, no part of the English law "which requires more consideration than the law "relating to debtor and creditor. It is a subject "highly worthy the wisdom and humanity of "this House, and I trust that it will, at length, "receive the attention which its importance de-"serves. To me, the law appears to have pro-"ceeded altogether on an erroneous principle. "It is too harsh towards the *person*, and too "relaxed towards the *property*, of the debtor. "It imprisons the debtor for not applying his "property to the fulfilment of his engagements, "while it leaves the property itself, which might

" have been adequate for the purpose, free and
" untouched. The consequence is, that there
" exists no distinction between insolvency and
" fraud. The same walls frequently contain
" half-famished creatures, who would perish for
" want but for the gaol allowance, and persons
" revelling in luxury, who prefer a residence in
" prison to the honest payment of their debts.
" An angry creditor might, until very lately, have
" doomed his debtor to imprisonment for life,—a
" punishment too severe for almost any crime.
" As far as the last Insolvent Act remedied this
" evil, it had my cordial approbation. That Act
" was, indeed, defective in many of its clauses;
" it left much to be done; but it was in every
" point of view an improvement on the periodical
" acts which had preceded it. Proceeding on a
" principle familiar to the legislation of other
" countries—that of the *Cessio Bonorum*—it en-
" abled the debtor, by an honest surrender of his
" effects, to recover his liberty. It interposed,
" ere it was too late, to rescue the unfortunate
" from the moral contagion of a prison, and gave
" to the most imprudent, and even criminal, an
" opportunity of retracing their steps, and of
" becoming, by the exercise of their industry and
" talents, useful members of society."

It was the object of the Bill of last Session to carry these principles into practice; and however great and important was the alteration thereby

proposed to be introduced into our laws, in reference to the rights and claims of creditors and debtors respectively, it was founded upon an elaborate review of the existing law by eminent and distinguished lawyers, and fortified by an extensive inquiry amongst practical men as to its operation and value, in reference to the security it afforded them in their dealings one with another, and in reference also to the nature of the check it presented to, and the punishment it inflicted on heedless extravagance or wilful fraud.

The result of that inquiry was a Report, on the Law of Arrest and Imprisonment for Debt, on which Sir John Campbell's Bill was founded.

One circumstance must, I think, have struck all who took any active interest in that important Bill; namely, the comparative indifference with which it was, and with which indeed the subject appears always to have been viewed by the public.

When the Report of the Common Law Commissioners was published, it attracted little or no attention. Few appeared to know of the existence of any such Report, and fewer still, I may venture to say, ever took the trouble to read it. The discussions in parliament were feeble in the extreme. The petitions were important neither in point of numbers nor in matter—and many evidently proceeded from one common source, of which any one would be instantly con-

vinced by an inspection of them; and the select Committee to which the house referred the bill, though singularly numerous in point of names, was by no means crowded by the attendance of members. Under these discouraging circumstances the bill would certainly have died a natural death ere the end of the session, but for the perseverance and energy of the Attorney-General.

Now, how does it come to pass that a question of this importance has excited so little attention, so little compared with what its importance and its close connexion with the minutest ramifications of trade would lead us to anticipate? In a numerical point of view, the *personal* interests immediately affected by this bill are far beyond those affected by the Poor-law bill, or even the Reform bill itself. The humbler debtors or creditors of *a single shilling* throughout the labouring population, and the debtors or creditors of thousands, are alike interested; and personal liberty and property are also, throughout the wide range of the population, and in every degree, affected by this measure.

If therefore the bill is, as we are told by Mr. Richards, the member for Knaresborough, one of its most prominent opponents, fraught with evil; if its "tendency is to destroy confidence and "wholesome credit;" and if it will be most "injurious to debtors and creditors;" I am surprised that it should have aroused no more formidable

opposition than it experienced whilst it was under the consideration of the House of Commons. For my part, I can only offer one explanation of this apathy—an apathy equally evinced by the press, the House of Commons, and the people generally, which is this, that whilst there is little or no confidence in the efficacy of the present law of debtor and creditor, more particularly since the passing of the Insolvent Act, yet there is neither the moral courage, nor indeed the information, necessary for the adoption of sounder principles of trade, and for the substitution of a just and effective control over property, for the now almost useless and profitless detention of the person. We daily perceive that the imprisonment of the person is no test of the property of a debtor; and yet, though a severe and an unsuccessful punishment, we fear to part with it, and to rely on principles which experience teaches us, in all other branches of legislation, are both efficacious and salutary. Mild punishments, for instance, are found more successful in repressing crime than severe ones: legislation has never been found permanently adequate directly to check the vices or improve the morals of a nation. Sumptuary laws, licensing systems to prevent drunkenness, acts of uniformity in matters of religion, fiscal regulations against smuggling, prohibitory laws to protect trade or foster monopoly, have all failed, and failed upon the same principle—because violence

or penalties, or both, have been resorted to, rather than reason and justice, for the accomplishment of the object desired. So it is precisely with the imprisonment of the person as a test of property; honest men do not need it—dishonest men defy it. *This is the result of our daily experience,* and the proceedings under the Insolvent Debtors' Act are an incontestible proof of its truth. On the evidence of Mr. Reynolds, a chief commissioner of the Insolvent Debtors' Court, out of 4,000 persons imprisoned, 3,000 are discharged without even examination or opposition. I therefore repeat, that I can only account for the apathy I see amongst men of business on this subject, by their conviction that imprisonment for debt is not a successful way of getting their debts paid; whilst, at the same time, they are not yet ready to adopt the principle of Sir John Campbell's bill, viz. an effective legal control over the *property* of debtors directed by competent and impartial judges—in place of the imprisonment of the *person,* as a means of *forcing* a disclosure through intimidation and terror, and thus acquiring the possession of the property of the debtor.

It would appear from the Report of the Commissioners, that considerations such as these influenced their recommendation to abolish the practice of imprisonment for debt. They proposed, with Sir Samuel Romilly, to render the law "more

efficacious by making it less severe,"* and by rendering property of every description liable for the debts of its possessor. The measure proposed to Parliament was founded on these views; and, I believe, when the details of that measure are better known and understood, it will be seen that they are calculated to dispense equally justice and benefits to all classes.

The Commission to which I have alluded was appointed in 1830. It consisted of five commissioners, whose duty was to inquire into the subject of arrest and imprisonment for debt. In 1832 their Report was presented to Parliament, and printed; and in it four of the commissioners, Sir F. Pollock, and Messrs. Starkie, Evans, and Wightman, came to this conclusion:—"That the principle of the present law is to "do justice by the use of strong and compulsory "means of arrest and imprisonment, applied "indiscriminately. *The system has been found "productive of so much hardship and injustice, "that it was at last deemed to be necessary to "mitigate its consequences by the enactment of the "insolvent law.* The joint operation of the two "opposite processes for the imprisonment and "enlargement of debtors has been productive of "so much evil, as to lead to the suspicion, which "seems to be fully verified by inquiry, that the

* Speech on Insolvent Act, 1815.

"mischief ought to be obviated not by provisions "designed for the mere mitigation of its conse- "quences, but by removing its cause; that is, by "limiting the power of imprisonment itself, and "confining it to cases where it is warranted on "the plain and just principle of preventing the "debtor from fraudulently absconding or removing "his property beyond the reach of justice, or for "the punishment of actual fraud, or compelling "the debtor after judgment either to pay the debt "or make a cession of the whole of his property "for the benefit of his creditors."

One of the five commissioners, Mr. Serjeant Stephen dissented from this opinion, and in a separate report stated his reasons at full length. He says, that "he has not been able to satisfy "himself that it would be right or safe to advance "so much further in favour of the liberty of the "person, as to abolish either *arrest in execution*, "or *arrest before judgment*, or to restrain the "latter to the case of meditated flight. He is "inclined to think that these checks upon the "fraud, remissness and improvidence of the "debtor, ought to be maintained in full force. He "even doubts whether they have not been already "too far relaxed;" and he subsequently says, "In the nature of things, so much danger must "always exist of a debtor's concealing his pro- "perty, or being remiss in his exertions to pay, "*that it is impossible to arrive at satisfactory*

"*proof of his ability, without first subjecting it to* "*some test; and no specific test can be devised so* "*mild as that of imprisonment.*" On one important point, however, the five commissioners are agreed; viz. that *all kinds of property should be subject to execution upon a judgment*:—an opinion of very considerable importance in all discussions upon this subject, because holders of certain kinds of property, who are otherwise often protected from arrest, are practically, but unjustly, exempted from an obligation which the law ought, without distinction of persons, to enforce upon all—the obligation to pay the debts they contract, by rendering their property of every description liable for their liquidation.

Now, doubtless, very great stress will be laid upon Mr. Serjeant Stephen's opinions on this subject; but I think more weight will be given to them than they deserve. I do not say this from any disrespect to the Learned Commissioner, nor from any vain opinion of my own superior acuteness, (and legal learning on the subject I have none,) nor from being insensible to the labour and ability everywhere visible throughout Mr. Serjeant Stephen's report, which he simply styles a "Supplementary Paper," but because I think I find evidence of the unsoundness of his principle, that imprisonment is a *specific test* of the ability of a debtor to pay his creditors, within the very able paper itself from

which I have made the immediately preceding extract.

I shall therefore at once consider the argument and the facts on which Mr. Serjeant Stephen relies in opposing the conclusions to which, by a joint investigation of the subject with himself, his colleagues in the Commission were led; because otherwise whatever facts may be adduced, or reasons advanced, either for the limitation of the power of arresting a debtor, or in favour of the bill introduced by Sir John Campbell, I know I shall be met at every step by the remark, that I have overlooked the objections to the measure urged so powerfully by the Learned Commissioner.

Now I will state the question in Mr. Serjeant Stephen's words; he fairly states it, and I join issue with him. After noticing the objections of those who hold imprisonment for debt to be essentially unjust, he says, "It may safely "be concluded, therefore, that imprisonment "*in execution* is not intrinsically unjust to the "debtor. *Whether it is expedient for the com-* "*munity is a different question, and one that must* "*depend upon the degree in which it is important* "*to the protection of the creditor, compared with* "*its attendant evils and inconveniences.*" He then goes on to say, "that in the present "state of the law of England upon the subject "of execution, it is both expedient and necessary; "because no legal process (in ordinary cases)

"exists, under which the plaintiff can seize the "property of the defendant in execution, unless it "happens to consist in goods, leaseholds, or free-"hold land: copyhold land, cash, funded pro-"perty, and other securities for money, debts, "and other forms of capital, are exempt; and "even the freehold land is but partially liable, "the plaintiff being entitled only to a moiety of "the rents and profits during the life of a tenant. "This singular state of the law operates with "less hardship upon the creditor than might be "supposed, because the power of taking the body "in execution enables him to enforce payment "indirectly from the property; *but to take from "him this power without giving him a direct "recourse upon property of every description,* "would of course render it almost impossible to "recover debts in this country, and lead to evils "against which no inconvenience produced by "imprisonment can be weighed for a moment."

Now it never was proposed to take from creditors the power of arrest and imprisonment for debt without giving some direct recourse upon property of every description. If therefore the attainment of the property of the debtor, for the liquidation of his just debts, be really the object of the law, it deserves consideration whether or not an indirect method of attaining it shall any longer be allowed to prevail against a plan for directly attaining it—and whether the present law ought

to be upheld which practically frustrates the admitted end in view, and which, to quote Sir Samuel Romilly's words, is " too harsh towards " the person, and too relaxed towards the pro- " perty of the debtor," in preference to one which shall effectually make all property liable for the just debts of its possessor, and relax its hold on the person of the debtor. It might be thought, that the removal of these absurd distinctions made by the law between different kinds of property, all of which is justly liable for a debt contracted on the faith and credit of its possession, and the giving " a " direct recourse upon property of every descrip- " tion," for which the learned Commissioner is an advocate, would justify and safely admit of a limitation of the power of arrest, if not its abolition. But no! even if that is done, arrest in execution is still maintained by Mr. Serjeant Stephen, and not only arrest in execution, but arrest on mesne process, or before judgment; so that in fact the creditor, according to Mr. Serjeant Stephen, ought to be invested with additional, and, if possible, entire powers over the property, and retain the power he now has over the person of the debtor! This is no doubt consistent with the learned commissioner's opinion that the law has been already too far relaxed; but it is really neither more nor less than rolling back the tide of experience, and reverting to a severer and an exploded system of legislation, *which, when it existed in its most*

awful shape—when the smallest debt might incur the penalty of imprisonment for life—totally failed either to give the creditor security against fraud and improvidence, or to prevent concealment of property, and thus to act as the "specific test" of ability to pay—on which ground Mr. Serjeant Stephen mainly defends the right of the creditor to arrest his debtor both before and after judgment.

If faith in the power of imprisonment for debt as a means of enforcing the payment of debts be really general, it is singular that, in proportion as we have extended our trade, in proportion as our commercial transactions have become larger in amount and more complicated in detail, the conviction should gain ground that a relaxation of the law of arrest was both politic and expedient; and still more singular is it that in *practice* such relaxation should take place much more extensively than in *law*. Why do men thus voluntarily desert the severer, and resort to the milder, system of securing their property? Why do they trust more and more to caution, to character, and to self-interest, than to the law of arrest? Because *the law* has been found, whether in a severe form or in a mild form, wholly inefficacious either in preventing improvidence or fraud, or in securing the property of fraudulent debtors; and because in proportion as the *real interests of creditors* have been better understood, they have been beneficially acted upon, and caution in giving credit has

been found a better safeguard of property than even a Draconian code of legislation. The punishment of fraudulent debtors, and the protection of the property of creditors, are questions entirely distinct, and must not be confounded, as in considering this question they too commonly are. Arrest *before judgment* is not intended, and it cannot be defended *as a punishment*, but it is intended as a "test" of solvency, and as such it has notoriously failed, and failed alike, whether mild or severe in its consequences. But notwithstanding our experience, Mr. Serjeant Stephen would retrograde once more, or compound a new law as severe as the conflict between humanity on the one hand, and love of money on the other, would allow.

I do not, indeed, think the learned commissioner has any very great confidence in his own principles; for, after elaborately defending his views and justifying arrest, both before and after judgment; after producing evidence in favour of its expediency and necessity, and showing it to be *indispensable*, he at length concludes his argument in the following remarkable passage, which is certainly as satisfactory to the advocates of the abolition of arrest for debt as the course of the learned gentleman's previous reasoning could fairly lead them to expect:—"The undersigned "commissioner, before he dismisses the present "or third objection to abolition, is not only willing

" to admit, *but anxious to state that, so far as the* " *tendency of arrest to promote payment is con-* " *cerned, the question under discussion would be* " *very much affected by such changes in the general* " *system of judicature as should materially reduce* " *the delay and expense of a suit at law.* The time " now required for enforcing payment in a simple " case may be calculated at about three months; " the outlay of money may perhaps be correctly " estimated at about 30*l.* If the improvements " which have been already suggested by the " common law commissioners in former reports " were to be carried into effect, it is probable there " would be a retrenchment both in time and " money to the extent of one-half or two-thirds. " *In such a state of things the argument derived* " *from the tendency of arrest to facilitate payment* " *would, in all its branches, be considerably weak-* " *ened!*"

This is precisely what the supporters of the Attorney-General's bill say—quicken, cheapen and simplify the law in reference to the property of debtors, *of all descriptions*, and you may give up your "specific test" the prison, and write upon the empty walls, what a dearly bought experience has long written for all who would open their eyes and read—*Carcer non solvit!*

LETTER II.

In my last letter I endeavoured to point out the grounds upon which four out of five of the Commissioners appointed, amongst other things, to inquire into the present system of arrest for debt, proposed to alter the present law. I also drew attention to the fact that one of the five Commissioners, who declined to join in the report, which recommended the abolition of Imprisonment for Debt, except in certain cases, but proposed at the same time to substitute "cheaper and speedier means for the recovery of debts *such as are usually the foundation of arrests*," had made this important admission; *viz.* that the argument derived from the tendency of arrest to facilitate payment would in all its branches be considerably weakened, provided such changes in the general system of our judicature were introduced as should materially reduce the delay and expense of a suit at law.

Since the date of the publication of that report

various improvements in our system of judicature have been introduced, greatly reducing both the delay and expense of a suit at law; and hence the arguments adduced in the "Supplementary Paper" against the recommendation of the Commissioners, must be considered as already materially weakened, and no longer, on legal grounds, deserving an equal degree of consideration. On the Reports of the Common-Law Commissioners several bills were framed and have passed, by which the process in all the courts of Westminster Hall is rendered uniform, and the practice is greatly simplified—*so that cheaper and speedier justice may be now attained.* Three new judges have been appointed; and by the Act for uniformity of process, a power is given to the judges to make rules of practice, which rules have been framed, and have now the force of law; and I would hope that the declaration in Magna Charta, that justice shall neither be denied nor delayed to any man, is fast approaching a really practical consummation.

Looking, therefore, at the recommendations of the four Commissioners for the improvement of the law as a preliminary condition of the proposed abolition of arrest; and keeping in mind the main arguments on which the resistance to this proposal is founded, *viz.* the imperfect and expensive state of the law in this respect, which it is admitted diminishes the value of arrest; I

think I am justified in concluding that the difference of opinion in a practical point of view between the Commissioners is not so great as it would appear at first sight; and I insist the more upon this approximation of opinion, because the arguments of Mr. Serjeant Stephen against the Attorney-General's bill were eagerly seized upon by its opponents, whilst the admission he made was altogether forgotten.

That the power of arresting for debt both has been and is greatly abused, no one will be found to deny; nor can it be denied that to allow a party to be imprisoned at the will of a private individual acting for his own benefit, without any pooof of fraud, is not only inconsistent with every sound principle of justice, but is wholly at variance with the spirit and policy of the law of England in other respects, and, with little exception, *contrary to the practice of every other nation in Europe.* The evidence, therefore, in favour of the continuance of such a law ought neither to be scanty nor doubtful. It ought not to proceed in any way from interested parties. It ought alone to rest clearly on its practical and absolute necessity, and even then only so long as no adequate substitute can be found. Nothing short of this ought to permit for an instant such injustice in our system of jurisprudence.

On referring to the Report of the Common Law Commissioners, the grounds on which

the alleged necessity of this law is defended are the following:—*That it is a check on improvidence;* that it is *the best means of compelling a debtor, and the only specific test of his ability, to pay;* that it is a *protection to, and facilitates the recovery of, property;* and that it is hence inseparably *connected with our system of credit, which would be narrowed injuriously without it.* These are the grounds on which the law of Arrest and Imprisonment for Debt is now maintained, and I shall consider them in the first instance, and before I say a word either in favour of or upon the bill for abolishing it and substituting in its place greater facilities for the recovery of debts, and the punishment of fraudulent debtors.

With regard to the moral influence of this law in checking improvidence and extravagance, I believe it to be *directly,* wholly inoperative, and *indirectly,* rather calculated to increase the number of improvident tradesmen and spendthrifts, than otherwise; and I will assign my reasons for this opinion, and adduce such evidence as I can in support of them.

I have already expressed my belief that laws intended directly to reform the morals or the manners of the people have failed; and I may add, that legislation for this purpose is fast falling into disrepute. In this point of view, therefore, I am disposed to doubt the influence of the law of arrest as a check on improvidence. Lord

Brougham has I think justly, said, "that the "efficacy of imprisonment in deterring indivi- "duals from running into debt has been greatly "overrated. Insolvents who are honest must "have suffered from misfortune, or been disap- "pointed in the hopes they entertained of being "able in one way or other to discharge their "debts. The fear of imprisonment does not "greatly influence such persons; for when they "contract debts, they have no doubt of their "ability to pay them. And although the imprison- "ment of *bonâ fide* insolvents were abolished, it "would give no encouragement to the practices "of those who endeavour to raise money by false "representations; for these are to be regarded as "swindlers, and ought as such to be subjected to "adequate punishment."* It might be added, that if the law as it stands were effectual in proportion to its activity, we ought by this time to be reputed a frugal, careful nation, more especially in our commercial dealings—a character, I fear, few will say we deserve. There are at this time from 13,000 to 14,000 persons in prison for debt. These persons are actually suffering the penalties of their improvidence; add to this number all bankrupts, insolvents, and all who are now liable to arrest, in the face of this boasted check on improvidence—and could this formidable list be made out, I think such a mass of the population

* Speech on the State of the Law.

would be found to have acted, and to be acting, in spite of the terrors of the law, and in opposition to the supposed humane intentions of the legislature, that it would not even be a question whether humanity and legislation had ever been so entirely wasted before. In proof that this wholesale incarceration, and liability to incarceration, operates but little in restraining improvidence, let us turn to the evidence published by the Committee on Commerce, Manufactures, and Shipping. In the Appendix there is a return from the official assignees under the new Bankruptcy Act, entitled, "Returns as far as they have been received from "the several official assignees, of the number of "fiats of bankruptcy which they have had in "charge in each month since their appointment, "and of the causes to which they attribute such "bankruptcies." Now, keeping in mind that imprisonment for debt is regarded as a check on improvidence, it is remarkable that by far the greater proportion of the failures of which an account is given, resulted from improvidence, or from general mismanagement and improvidence together. At least five hundred out of six hundred cases quoted are attributed, by the official assignees, to causes over which the parties had entire control, which proves that the moral effect of the fear of imprisonment, in all these instances, was wholly fruitless. And that this is true more extensively, and suggests the true cause

of the insolvency of most persons now in gaol, I infer also from its being twice stated by Mr. Serjeant Stephen, in the "Supplementary Paper," that insolvency "results more commonly from impru-"dence, or from fraud, than from inevitable "calamity." Hence, surely, we ought to be led to this conclusion—that this fear of Imprisonment for Debt fails to restrain improvidence; that the law is not well framed for the punishment of fraud, whilst inevitable calamity ought to be wholly exempted from its operation. *This is precisely what the Attorney-General's bill proposed to effect.* It is not now the question whether the bill effected this in the best way or not. This was the object of the bill; and if the principle had been admitted, all who were interested in its progress would have patiently waited for the settlement of the details.

But if imprisonment for debt be such a check on improvidence as it is assumed to be, why is any individual, or class of individuals, exempted from its consequences? If it be intended as a punishment, or to amend our morals in reference to pecuniary obligations, all ought undoubtedly to be subjected to it alike, without distinction of person or condition. There is as much and more that is reprehensible in the prodigality of the ich, than there is in the extravagance of the poor. Yet how many of the former are sheltered by law from the penalty of their improvidence;

or, not being so, go abroad, or live on in vice and extravagance in the King's Bench or the Fleet, or some other prison, wasting in fact the property of their creditors, without molestation and without shame! Whatever merit this law may possess as it at present stands, clearly *justice* is not one of its attributes; and with as little propriety is mildness attributed to it by Mr. Serjeant Stephen; for by the returns on this subject in 1833, three-fourths of the whole number then in prison were too poor to provide themselves with bread! Can this law be considered, then, as either just or mild?

But I have said that, indirectly, the law of debtor and creditor, as it stands, is rather a protection to the spendthrift and the prodigal than otherwise. Instead of checking the prodigal, it rather favours his delinquency.

In the first place, if the apprehension of imprisonment be an inducement to the debtor to pay, it is also an inducement to the creditor to trust—to trust without any inquiry as to the knowledge or property of buyers, and to trust upon the notion that the power of arrest will hereafter secure payment. The facility with which credit is thus given, encourages the buyer to incur debts without any present means of payment, though perhaps in a great majority of cases, with honest intentions of paying them at some future time. Thus the reliance of the creditor

on this law increases the facility of incurring debts, and promotes extravagance,—for which its *future* severity, when called into action, presents but very imperfect redress in the imprisonment of the person; more particularly whilst property of various descriptions, such as bank notes, bills, book-debts, money in the funds, annuities, pensions, &c. are all beyond the reach of the law. Hence imprisonment is as little successful in compelling the honest surrender of a debtor's property as it is in the prevention of improvidence.

The truth of this is found in the working of the Insolvent Act, which is a subject of universal complaint. But when the working of that act is complained of, it must be recollected that from the "unrestrained power of arrest, *facility of credit*, "*crowded gaols, and a court of discharge*, are suc- "cessive and necessary consequences of the system." In fact, improvidence is fostered in every degree by this false reliance on personal constraint, and the consequent neglect of the sounder principles of trading.

There *have been* commercial houses of great extent who trusted almost indiscriminately, with whom an attorney's office was almost a part of their establishment, who drew for every account, however small, and visited the slightest want of punctuality by a notice of, or actual arrest. They probably succeeded where others, not quite inured to such heartless policy, did not. They traded

upon the repulsive harshness of the law, and were constantly paid in preference to others. Perhaps they ruined the trader, and left him to the mercy of the Insolvent Act, and the humanity of the remaining creditors.—Trade, however, conducted on such principles is worse than gambling—it engenders all its selfishness and recklessness, and its mischiefs are spread over a far wider space.

LETTER III.

I HAVE already regretted that the abolition of imprisonment for debt does not receive that careful and enlightened consideration which it deserves at the hands of those who are interested in the trade of the country. It well deserves to have attention bestowed upon it, and it is more closely connected with the improvement of trade than commercial men appear to imagine. Of this we are certain, that whatever tends to facilitate the diffusion of capital safely over the widest space, whatever tends to render property fairly and immediately responsible for that trust which a man receives on the faith of its possession, and particularly whatever facilitates the recovery of property, be it money or goods, which has been entrusted *not* on the faith of property, but on that of character alone, must extend, not narrow credit, must protect, not endanger capital; and must also, as effectually as the law can, prevent the waste of the property of others by the spendthrift,

and its unjust and illegal detention by the dishonest. Now, the Bill for the abolition of Imprisonment for Debt aimed at the accomplishment of these desirable objects, and therefore claimed the attention and calm consideration of all engaged in trade. Labouring under the impression that the fear of arrest now operates to induce debtors to pay their debts, and that mischief would ensue were this imagined security withdrawn, they wholly overlooked the evils which the system itself engenders—the misery, the dishonesty, and that indiscriminate credit which in its turn furnishes the very proofs on which the advocates of the law as it is rely to show its importance and necessity.

In this letter I propose to consider whether arrest for debt is the best means of compelling a debtor, and the only specific test of his ability, to pay; and whether the present law is a protection to, and facilitates the recovery of property.

The subject is divided into two distinct branches; arrest before judgment or upon mesne process, and arrest after judgment, or upon final process. In the first case, a debtor, or an alleged debtor, holds his liberty at the mercy of his creditor, an interested party, and one who freely entrusted him with that property, which now, by a summary process, and without judicial intervention, he determines to recover. He imprisons his debtor without the permission of any judge or

court, and perhaps without notice, in order "that "his person may be ultimately accessible to the "plantiff's execution *in the event of his obtaining* "*judgment.*"*

In the latter case, of arrest on final process, judicial investigation and decision must precede arrest; but "it does not depend upon the amount "of the sum due, nor is the arrest bailable."

When, after trial, judgment is given and execution issues, "nothing can be taken but goods "and chattels, properly so called, which does not "include bank notes, bills, book-debts, money in "the funds, annuities, pensions," &c.; "and "unless the person of the debtor was detained "until the debt was satisfied, the judgment would "frequently be fruitless, though the debtor might "be possessed of ample property, which could not "be reached by any process."

Accordingly the person is detained, and the result is, as we have seen, that three-fourths of those imprisoned are discharged under the Insolvent Act without examination, and without opposition by their creditors, who close the prison doors against their debtors on the one side, in order to afford an opportunity to the Commissioners of the Insolvent Court to open them on the other. Thus thousands are imprisoned every year, to the infinite advantage of attorneys, sheriffs' officers,

* Report.

gaolers, and practitioners and commissioners in the Insolvent Courts, but without the slightest benefit to creditors, for whom all this expensive machinery is maintained, and without affording the smallest security to property. In fact, it is injurious to property; it is only another tax on the community; for as the greater portion of those who are committed to prison cannot support themselves, the expense is borne by the county rate and the consolidated fund.

Three years after the passing of the Insolvent Act in 1813, it was stated in the House of Commons by Lord Brougham, that debts to the amount of 5,597,859*l.* had been discharged, and on which a dividend only was paid in gross of 1,459*l.* 10s. 4*d.* Since 1820, by a parliamentary return it appears that 43,528 persons have been discharged, the assignees of only 10,271 of this number have accepted and taken out their appointment, and of this latter number again only 1,785 have received any thing out of court! Two conclusious might even here be safely drawn from the fact of the unrestricted and indiscriminate arrest of the person, as shown by this parliamentary return, and the operation of the Insolvent Act. The first is, that the power of arrest so freely and unwisely used, ought to be materially restrained, if not altogether taken away. The other is, that the Insolvent Court being wholly useless to the creditor if not actually mischievous, ought, if retained at all

to be entirely reconstructed under an improved system of law of debtor and creditor.

The first—the expediency of restricting the power of arrest—derives additional and almost conclusive support from the proceedings of creditors who have obtained judgment against their debtors. By the concurrent testimony of nearly all the mercantile and professional men who replied to the inquiries of the commissioners, it appears that in this case resort is hardly ever had to the arrest of the *person;* that, on the contrary, execution is issued against the *property*. But if the fear of imprisonment were effectual for the disclosure of property, and a specific test of a debtor's ability to pay, why is the much simpler and much less hazardous course of proceeding by arrest abandoned? Why not at once arrest, and throw upon the debtor the proof of insolvency or the payment of the debt; and that on the ground taken by the advocates of personal arrest, viz. that the apprehension of imprisonment presents the strongest motive to a debtor to satisfy his creditor?

But this course will appear the more extraordinary when the difficulties of proceeding against property in the present state of the law are considered. For example, it is said that if the power of the arrest of the person after judgment were taken away, the creditor would be driven to issue an execution against the property of the debtor,

under which (I quote the words of Mr. Serjeant Stephen) "he will have to find out the defendant's "property, seize it, and bring it to sale; and this "implies the employment of agents, the outlay of "money, and a considerable protraction of the "time of payment. In all such cases, too, he "incurs the material risk of coming into contact "with property which is claimed by some third "person, and of becoming involved in litigation, "and exposed to ultimate loss." Yet, notwithstanding these difficulties, Mr. Serjeant Stephen continues, "it is true that, even in the present "state of the law, he is often obliged to issue "execution; and it appears by the Appendix "that, *notwithstanding the inconveniences attend-* "*ing the seizure of property, he generally makes* "*his election in favour of this mode of proceed-* "*ing, and declines the alternative remedy against* "*the person.*"

Mr. Serjeant Stephen explains this stubborn fact thus—that the mode of proceeding adopted is the less expensive, and that the execution against property is no bar to a subsequent arrest of the person. But in considering the comparative expensiveness or inexpensiveness of the proceeding, no allusion is made to the risk of future litigation and ultimate loss; nor is it recollected that the whole tide of evidence is adverse to the practice of personal arrest where the debtor is supposed by the creditor to possess any property.

Now, whether the law is altered or not, this state of things would remain the same. But if the law were altered, proceedings against property would be facilitated; and in cases of refusal to disclose property, of the existence of which any proof could be given, or of fraud, the punishment of the debtor would certainly, by the Bill proposed, be more certain, uniform, prompt, and inexpensive. This is what the four Commissioners who recommended the abolition of the arrest of the person contemplated, and what Sir J. Campbell's bill would have effected.

But it is said that there is a class of persons with whom "it is easy to conceal fortunes, and carry "millions in a portfolio," and hence that this class can only be brought to pay their debts by the fear of imprisonment. Now it is well known that amongst this class personal arrest is hardly ever resorted to, unless in such cases as would be amply provided for by any bill professing to remedy the evils of the present system, because fraud, all agree, should be punished. But under the present law, which gives alike the greatest facility to the arrest and the discharge of debtors—and the one is a necessary consequence of the other—this is not done.

I should wish here to guard against the notion that a return to the old state of the law, by the abolition of the Insolvent Court, would be either desirable or beneficial. For this purpose I will

quote a passage from the Report of a Committee of the House of Commons on the subject of Imprisonment for Debt, in 1792, of which the present Earl Grey* was the chairman. It will show that arrest was then ineffectual, both as a check on improvidence, and as a means of compelling the payment of debts, when existing in all the terrors of interminable imprisonment, and in abodes then of filth and disease as well as profligacy, such as are now unknown since the passing of the Gaol Act.

"Your committee think they cannot better conclude than in the following words of the statute of 21 James, c. 24:—'That divers persons of sufficiency in real and personal estate, minding to deceive others of their just debts, for which they stand charged in execution, have obstinately and wilfully chosen rather to live and die in prison than to make satisfaction according to their abilities." "They conduct themselves," continues the Report, "as men who think that they have no longer any interest in being honest, and know that the law, *by imprisoning their persons, has spent its force against them.*"

Thus this barbarous law aims at forcing payment from a large proportion of those who, as

* With how many great questions of national policy is the name of this distinguished Nobleman and Statesman associated!

we have seen, have nothing wherewith to pay, while it fails to compel payment from those who have the means, but who choose to defy its power; and yet notwithstanding, it is considered protective of property, and beneficial to trade!

Arrest on mesne process, or before judgment, is admitted to be a practice indigenous to England; and whilst so much stress is laid upon it, in reference to credit, it may be as well to ascertain from the Appendix to the Report of the Commissioners the state of the law in other countries, and particularly in commercial states.

The practice has of course extended to America where however, according to the answers given to the Commissioners' inquiries by Mr. H. Wheaton, one of the Commissioners for revising the statute laws of New York, the "question has recently "been much discussed, and the tendency of "public opinion is very strongly in favour of a "relaxation in this respect." Accordingly, since the date of Mr. Wheaton's paper, the State of of New York, not the least commercial or enlightened state of the Union, and that of Maine, have abolished imprisonment for debt. The legislature of New York almost unanimously passed the law, and we are informed by the Vice-Consul, Mr. Buchanan, who also, amongst others, replied to the questions of the Commissioners, that "this material change in the jurisprudence

" of this state *seems to have met with the approba-*
" *tion of the creditor as well as debtor;*" and, as it appears to me, for reasons most obvious and satisfactory, *viz.* that " every description of pro-
" perty is liable for debt," and that " there are no
" means by which the debtor can withdraw any
" description of property from the operation of
" the law." Mr. Serjeant Stephen would appear to connect this relaxation of the law of arrest with American notions of liberty and democracy. It appears to me, however, much more likely to be caused by a regard for property, much more wary and sagacious than we exhibit in adhering to the delusive arrest of the person, instead of resorting to the real security to be obtained by making every description of property liable for debt, and by introducing cheaper and speedier legal proceedings.

In America *generally* arrest on mesne process is beginning to lose its value (see also Mr. Meredith's Answers—Pennsylvania); whilst in none of the great commercial states of Europe does it exist at all. I will glance at the state of the law in a few of them.

In the canton of Berne, one of the most enlightened of the governments of the Helvetic Confederation, in reference to its laws and institutions, " arrest for debt is not considered requisite for the protection of the creditor."

In France, " arrest for debt is permitted only
" by virtue of a judgment."

In Hamburgh, "there is no arrest for debt "before judgment;" and in the communication made by Mr. Canning, the British Consul, it is added that "the judges are not easily induced to "grant the arrest of a person, but when they do, "the oath of a creditor is neither required, *nor* "*would it be taken;* other evidence must be pro- "duced—documents or letters with the signature "of the debtor, and witnesses to the transac- "tions."

In Lubeck, arrest is not allowed before judgment, and here "opinion leans against arrest "*generally,* since *there are few cases in which it is* "*really conducive to the end in view.*"

In Prussia, arrest before judgment is not allowed, and a commission, appointed to suggest such alterations in the existing laws as should be judged necessary, has proposed as a "general "rule, that henceforth imprisonment for debt "should cease." It is considered, "in most in- "stances, of no advantage to the creditor, and "very prejudicial to the debtor, whom it deprives "of all means of earning his livelihood, ruining "his family, and *always demoralizing him.*"

In Portugal, "arrest for debt in cases which "merely form the subject of an action in the civil "courts is neither permitted before nor after judg- "ment, except when the creditor can prove that "the debtor possesses property and fraudulently "conceals it to save it from seizure."

In Spain, the law appears, in some degree, to resemble our own, but practically its operation must be very different; for Dr. Cambronero, whose communication forms part of the Appendix to the Commissioners' Report, says that, "perhaps, "at the present moment, there is not a single "individual arrested for debt in our prisons." He, too, thinks that indiscriminate imprisonment for debt should not be allowed, but that "those "considerations should not be forgotten which "distinguish the culpability from the misfortune "of the insolvent debtor."

Such are the opinions entertained abroad on the subject of arrest before judgment; and I am happy to perceive, by the petitions presented last sessions to the House of Commons, that similar opinions are gradually prevailing amongst us. In the petitions from Manchester and Liverpool this branch of the system is given up.

Undoubtedly, for arrest after judgment, or after final process, many and much stronger arguments can be adduced than for arrest before judgment. But when we inquire into its practical value, and its estimation amongst both professional and commercial men, we find, as I have already pointed out, that notwithstanding the inconveniences and risks attending the seizure of property, "they "generally make their election in favour of this "mode of proceeding, and *decline the alternative* "*remedy against the person.*" An answer of Mr.

Alderman Venables to one of the questions proposed by the Commissioners is so clear and concise, and presents so good an epitome of the whole evidence on this point, that I shall quote it at length. The question is, "Having obtained "judgment against a debtor, is it usual, or in "your judgment advantageous, to issue execution "against his person, unless process against his "property has been resorted to in vain?" The answer is, "*If the remedy were complete against "a debtor's property, execution against his person "appears to me unnecessary; there is no such "remedy, however, at present.*" Sir John Campbell's bill would have rendered it unnecessary in all but cases of fraud, and provided the remedy most justly demanded.

Other authorities, more facts, and much more reasoning, could be adduced in favour of abolishing imprisonment for debt upon mesne and final process; but I hope that I have said enough to induce some others more fully and ably to investigate the subject before it again comes under discussion in parliament.

On imprisonment for debt generally, I will only remark — that if personal imprisonment be the most effectual and least expensive means for the recovery of debts and the protection of property, it is singular that, as our trade has become more extended and more complicated, the whole course of legislation should have been for years steadily

that of a mitigation of the severity of the ancient law. From arrest being allowed for any sum, however small, an amount was fixed below which no arrest was permitted, *viz.* 10*l.* From that sum it has been raised to 15*l.* and again to 20*l.* where it now stands. An affidavit is demanded where none was formerly required. At least a dozen Acts of Parliament have passed in mitigation of the law of arrest; and lastly, the Insolvent Debtors' Act has very nearly deprived imprisonment of all its terrors. To the dishonest it has undoubtedly done so. Imprisonment for debt has been condemned by a great legal authority in our own time—no less than that of Lord Eldon; and the advocates of its abolition may also quote the high authorities, as moralists, of Drs. Paley and Johnson in their favour.

Looking hence at the results of experience in our own country, considering that arrest on mesne process is given up in the petitions from two of the greatest commercial Towns in the Empire,—that arrest upon final process is rarely resorted to even in the present state of the law; and keeping in mind also the opinions and practice of commercial nations abroad, it appears to me to be a sound conclusion, that the imprisonment of the person is ineffectual for the recovery of debts, and most prejudicial to the community, and that the time has come for a review of our whole system, and for legislating on some principle for the

protection of the interests of creditors, other than that which is now the basis of our commercial policy in this matter. If our present system was the best means of compelling a debtor, and the only specific test of his ability to pay, as contended, it is almost impossible that in a commercial nation, such as ours, the whole tendency of our legislation should have been to impair its powers. And when our experience of it in practice, on the one hand, furnishes us with no more satisfactory evidence in its favour than it does; and, on the other, affords us so large a measure of evidence and authority strikingly adverse to its practical value and utility, I think there is strong reason to doubt its value, and to justify a change of the principle on which it is founded.

LETTER IV.

One of the most common prejudices against the abolition of arrest for debt is founded upon a vague apprehension of *injury to credit.* It is imagined that in the transactions between merchant and dealer, and dealer and consumer, there will be no longer the same confidence, and that credit will be neither so extensively nor so freely given as it is at present, when fostered and encouraged by the law of arrest. In order to ascertain the opinions of men of business on this amongst other points, the Commissioners addressed a circular of interrogatories to merchants, bankers, and traders of all kinds, in all parts of the country, and obtained it appears from their Report, answers from 343 firms and individuals in reply to the following question:

"5. Do you think if the right of arrest on mesne "process were to be taken away, the facility of ob- "taining credit would be materially diminished?"

It must be admitted that a great deal of very conflicting evidence was obtained. We

find amongst the respondents every shade of opinion is entertained. Some say, abolish arrest on mesne process, and credit will be "*annihi-*" "*lated;*" others, that confidence will be *increased;* some, that you will take away the only inducement to give credit; others, that credit is now only given to those who are considered safe; some think that credit, if diminished, would be beneficially diminished; and amongst others, a few Bankers think that "Mr. Peel's Bill" has already injuriously restricted credits. In fact, the evidence is a vast mine, which may be successfully worked by men of all opinions on this subject, and contains ore of every quality, from the pure native metal to the impurest alloy, not worth the labour necessary to extract and refine it. It is however satisfactory to find, believing as I do any restriction of the right of arrest, coupled with a more prompt and effective recourse to property, to be a great commercial and moral improvement of our law of debtor and creditor, that there is a great majority of the respondents who have answered the question addressed to them unequivocally and decidedly *in the negative.* They are distinctly of opinion that credit would not be diminished by the abolition of arrest on mesne process; and they are also of opinion that the power to arrest is not contemplated in the ordinary transactions of trade, and forms no inducement to trust. "If," says one of the respondents (No. 217), "a person

" comes for credit, I inquire into his circumstances;
" I do not consider by what course of law I am
" to recover the amount he may contract. If I
" thought I should have to recover a debt by law
" at the time I gave credit, I should not trust."
Again, No. 229, " Speaking for ourselves, we
" should never give credit to any man with the
" prospect of having to enforce payment by law;
" as, therefore, the credit we give rests solely on
" our opinion of character and ability to pay, we
" do not think that if creditors were deprived of
" the power of arrest there would be much if any
" greater difficulty in obtaining credit :"—and in reference to the supposed diminution of credit, there is abundant evidence to show the opinions of persons in trade generally to be, that the (No. 232), " diminution would neither be mischievous nor " inconvenient," if it did occur. The prevailing opinion however is, that no diminution of credit would take place.

If however, Imprisonment for Debt were a sure and certain means of enforcing payment, and if its terrors deterred all from borrowing who were not morally sure of their ability to pay their debts, then, restricting it in practice, and impairing its effect on the mind, would tend to derange if not to injure our system of credit in business transactions. But this, unfortunately for the admirers of the law of arrest, is not the case. " Arrest for the " recovery of debts is rather an experiment than " an effectual proceeding; it leaves the *creditors'*

"*property* at the disposal of the *debtor*, and places "the *person* of the debtor under the *control* of the "creditor. As a mode of punishment it subjects "the debtor to imprisonment, and the privations "consequent upon crime; while it affords facili- "ties to the fraudulent, who avail themselves of "the alleviations due only to misfortune." *

But before any practical man pronounces an opinion on the degree in which he thinks credit may be affected by a relaxation of the law, let the means proposed for the recovery of debts, by the Attorney-General's Bill, be carefully compared with the means the law now affords for this purpose; and then the question may be fairly discussed, provided the principle of the Bill be conceded. Discussed however in detail, neither this Bill, nor any other Bill, can ever be with advantage, whilst arrest for debt both before and after judgment is considered essential to the security of trade, and the prevention of fraud. Let it be admitted, that individual vigilance in trade, coupled with an impartial, prompt, and effective law for the recovery of debts by a direct recourse upon property of every description, and the punishment of fraudulent debtors, is the best means of checking improvidence, maintaining credit, and protecting property, and then a Bill like the Attorney-General's may be discussed with advantage. But the opponents of the Bill have never really conceded the principle on which it

* Pamphlet by a Barrister.

was founded:—viz. that an effectual control over the property of debtors was preferable to the constraint of their persons. To be sure, we are told by one very persevering opponent of the Bill, "that it is impossible to feel any objection to the "principle of the Bill," whilst at the next moment is declared an "*unqualified* preference for "the judgment of the learned Commissioner who "signed the Supplementary Paper," whose judgment is this, that imprisonment for debt is neither intrinsically unjust, nor inexpedient; and that it would be neither right nor safe to abolish either arrest before or after judgment!*

To return however to the question of credit. Before I proceed further I will attempt to explain what I understand by the term credit, as it is used in reference to the transactions of trade generally. Credit is really nothing more than that period of time during which one tradesman entrusts another with goods or money to carry on his trade. During that period the goods or money are profitably used or converted into money, with which the debt thus contracted is to be paid. An honest man's debts and his assets are always proportioned the one to the other. And though all his debts taken together may be more than he can pay at any one time, they are not more than he can pay as the successive periods of payment arrive; and there is no power to enforce their

* See the published Speech of Mr. Freshfield, M.P.

payment earlier, unless it is to be found, as I believe it is, in the abuse of the power of arrest. If I am right, credit is a very simple and easily understood system, and not one, according to Mr. Freshfield, (p. 9,) " which is calculated to baffle " the efforts of the most acute mind to arrive at " a right conclusion. We live," continues the speaker, " in an artificial state of society, in " which credit represents the transactions of the " civilized world in an enormous disproportion to " the security existing in actual property capable " of being *suddenly realized.*" But the actual property here spoken of, by the very conditions of ordinary trading, at least, was never intended to be *suddenly realized.* Credit was not given on any such condition; the credit given, consisted of a succession of trusts of goods, or loans of money, to be repaid at fixed and successive periods: and as I have said, there is no disproportion in this point of view between the transactions of trade and the actual property capable of being realized when the appointed time for realizing it arrives.

But what I more particularly wish to show is this, that there is nothing magical in the operation of credit. The diffusion of capital, whether in the shape of money or goods, is merely another way of carrying out the principle of the division of labour for the greater increase of wealth. Its object and tendency is in the end to increase the wealth of the country. But the actual wealth or

capital at any one time is not augmented by credit; any more than capital is increased, by the transfer of the bales of cotton from the warehouse of the merchant to the loom of the spinner. The parts can never be greater than the whole; the diffusion of capital, therefore, cannot at the same time increase its amount.

The object of the creditor or capitalist is simply to discover the most productive labourer or debtor. The law may impede, but will rarely assist him in this endeavour. His success depends upon personal industry and experience: the law can give neither the one nor the other. Credit, therefore, in a country where property is adequately protected as well against open violence as secret fraud, will always exist and extend to its utmost limits, of which the capitalist is the best judge, and not the legislator. I agree with Mr. Freshfield in this, that "I believe it is a subject on which the less "we interfere the better;" and I therefore advocate the repeal of laws which do interfere and pretend to be "tests" of a debtor's ability to pay, and "checks" on improvidence, which lead men to trust to their assumed efficacy, instead of a reliance on what alone is trustworthy—prudence, industry, and hoarded experience.

The evidence fully bears out this opinion. Nearly two hundred of the respondents out of three hundred and forty-three are of opinion that

credit would not be injured were arrest abolished; and many think it encourages too great a facility of credit, and is mischievous. But if credit were to be annihilated by taking away arrest for debt, how does it happen that credit is so freely given below the amount for which arrest is allowed? The debt must now be 20*l.* or upwards before this vaunted security appears. Nevertheless, credit ranges as freely within as without the prohibited limits, as I will show from the evidence of the parties who give the credit.

In 1823, a committee of the House of Commons was appointed to inquire into the mode in which small debts were recovered in England and Wales; and it appears from the evidence published, that in some cases five-sixths of the sums due to the tradesmen examined were below 20*l.*, and therefore, taking the time and legal expenses into consideration, which were also necessary for the recovery of such small debts as were within the jurisdiction of Courts of Requests, they might almost be considered as debts of honour. Yet, according to the evidence, credit was as freely and as injudiciously given below as above that amount. There was no complaint made of an injurious diminution of credit in reference to transactions under the arrestable amount. All that the parties required was a cheaper and easier mode of recovering their debts, and to that they were fully entitled.

LETTER V.

THE evidence given before the committee I have alluded to proves (and for this object alone I quote it) that trade is carried on and credit given where no protection is afforded by the law of arrest, precisely as in the opinion of the respondents to the commissioners' queries it would be were arrest for debt abolished. And, though both observation and experience would lead us to such a conclusion had it not been so fully confirmed by witnesses of unquestionable competency, yet it must not be forgotten that there is one general demand for a reconsideration of the law of debtor and creditor, which, whilst it neither deters nor encourages credit, is as it at present stands, but a source of vexation and expense to the honest trader, and of profit and advantage to the fraudulent and litigious. "In any alteration which may be contemplated" "in the law of arrest," in the opinion of the Manchester Chamber of Commerce, in their commu-

nication to the commissioners (No. 216), "the "principal object to be kept in view should be the "giving greater facility to creditors to secure the "property of a debtor by some speedy process at "the least possible expense, the general feeling "being to consider this as the paramount object, "and in a great degree to disregard the security of "arresting the body of a debtor." This is undoubtedly the sound principle upon which any alteration should proceed, and it is most clearly and ably propounded by the Vice-President of the chamber, by whom the letter is signed. And were the law adapted to the exigencies of trade on this principle, both the witnesses before the committee in 1823, and the respondents to the Commissioners' questions, would have little to complain of either on the score of the law's delay, or its present facilities for the encouragement of fraud, or its neglect of the just rights of creditors and the interests of trade.

There is, however, another class of interests which are supposed to be wholly dependent upon the power of enforcing payment by the fear of arrest. I allude to the multitude of small transactions between small shopkeepers and labourers, and generally such as occasion debts of every amount between one shilling and five pounds. Such debtors are placed within the operation of various acts of parliament, which constitute Courts of Request or courts of conscience. It is supposed

that if such courts were deprived of the power of imprisonment, the credit occasionally required by the labourer during the periods he was not in the receipt of wages, would no longer be given, and hence that much inconvenience and suffering would ensue. Now, there is one practical answer to those who apprehend the refusal of credit under these circumstances; and that is, that credit is given in many large and populous towns where at present no court of request exists; and as far as any information can be had, upon which such an assertion can be made, the labouring population are as well off in those places as though the expensive machinery of a court were maintained to superintend and preserve their morals and their credit.

But take another instance, in which credit is given where the power of arrest offers no inducement to the creditor to trust. There is an act of parliament which prevents a publican recovering by law any sum for liquor supplied at any one time to an amount less than twenty shillings, and which of course applies to almost all the transactions of the tap-room. But the publican trusts, and the labourer drinks just as freely as if no such law existed. It entirely fails to prevent tippling; and if its intention was to check it by making it a ready-money transaction, its object was impracticable, and its operation is mischievous, because it holds out a successful encouragement to paying

money for drunkenness, and taking *credit* for necessaries. It appears an enactment exactly calculated to perpetuate scores like those of Falstaff:—"Item, sack, two gallons, 5*s*. 8*d*.; item, bread, a halfpenny." I have, however, only to deal with it as an attempt directly to lessen the inducement to give credit by taking from the publican most unjustly the coercive power which other tradesmen have to enforce the payment of their debts; in this point of view it is a signal failure, and is inoperative in all but the mischief it produces. It is not more unjust to the publican than it is injurious to the butcher and the baker.

I am hence entitled to doubt whether credit or trust of this kind would be at all diminished if these courts had the power only of issuing execution against the goods of debtors. I freely admit that, for the enforcement of a certain class of debts, they would no longer, or rarely, be resorted to; and obviously because execution against the goods of the daily and weekly labourer or artisan would but seldom be worth the expense of it. I nevertheless think that both the shopkeeper and the labourer would be benefited by the change; and for this, amongst other reasons. The wages of the poor are wholly, as a general rule, expended day by day upon the actual necessaries of life. If this be so, and he must have a more favourable opinion than I have of the condition of our labouring classes who thinks other-

wise, then the same sum will be spent, whether courts of request lose their present power or retain it. The shopkeeper will receive, and the labourer expend, in either case, precisely the same amount; because the latter on an average never earns more than his necessities *force* him to expend, and the former under no circumstances can receive more.

But then it is said that there are occasions when the labourer earns nothing, and when he and his family must be wholly dependent for the necessaries of life upon the credit he has with the shopkeeper. And why not? The interest of the shopkeeper is as great to give the credit required, as it is that of the labourer to acquire a character to entitle him to be trusted in the hour of need. Why should the law break in and disturb this *wholesome credit*, and this natural reciprocity of interests? Why should the law, as it does, by fostering a reliance on the ultimate power of imprisonment, hold out to the one an inducement to trust without prudence and discrimination, and to the other the consequent facility of dealing without character?

As I am now strictly confining myself to meeting objections raised by those who think the repeal of the law of arrest would be productive of injury *to the poor*, I do not press into my service the numerous arguments and facts which all tend to show how mischievously the law works

for the real interests of the labouring class, and of, therefore, one great body of consumers: nor, consequently, how injuriously its ultimate influence acts on the interests of the shopkeeper and trade at large. Arrest for debt is at no time so mischievous as when directed against the labouring classes. The injury it inflicts on the community is infinite;—the service it renders individuals is at best limited and doubtful. There is a passage in the Report of the Committee which sat in 1792 on imprisonment for debt, to which I have already referred, which strikingly illustrates the misery distributed over society by this law, and which, if applied to the working classes, who are rarely provided with the necessaries of life beyond the week before them, must silence, I think, most men who conceive benefit to arise from arrest in execution when directed against the poor.—"The "greater part of the prisoners for debt," says the report, "appear to be married, and many of "them have very large families,—some five, "some six, and others ten children.—Of 570 "prisoners in the Court of King's Bench, about "340 have wives and children; and according to "the returns, the total number of wives and "children belonging to the persons then in pri- "son, as far as the number could be ascertained "in respect to those gaols from which returns "have been received, was 1,300 wives and 4,088 "children!"

They who think the fear of imprisonment is necessary to coerce the poor to pay their debts, know little of their habits, their feelings, or their principles, and know less of the sagacity and caution they constantly exercise in the ordinary affairs of life. That they are as strongly influenced by honourable feeling as their betters is strikingly shown in the history of Loan Societies. I doubt whether a similar return could be made from any other class of society. At Tunbridge Wells there is a loan society with a capital of 1,024*l.* Two hundred and forty-three loans have been made *at interest*, and not one case of dishonest defalcation has occurred. In Bath the loan fund has been established since 1808. The sum on an average annually lent has been about 640*l.* The annual average deficit about six pounds! In Bristol a society lent, *gross*, from 1812 to 1825, 14,360*l.*, and no loss has been sustained; and I annex to these observations some extracts from the Report of a small loan society established in London, and for the accuracy of which I can vouch.* There are many other instances of similar institutions, where money transactions, when wisely managed, have been carried on to a great extent without the aid of the law. Credit in these cases wanted neither encouragement nor protection. It was dictated by pure benevolence on one side,

* *Vide* page 73.

and accepted by grateful and honest necessity on the other. The committee on the state of Ireland in 1830, reported many similar cases, and many very interesting details may be found in a pamphlet, published by the Rev. Mr. Trench, on Loan Banks, in 1830.

Now, I think I have said enough to show that credit would be little, if at all affected by an alteration of the law of arrest. I could have extended quotations from the evidence to a greater length. Bankers and retail shopkeepers all concur in this, that credit would not be affected if arrest on mesne process were abolished—some, without any qualification—some, coupled with a condition that the law was extended in execution over property of every description. But they agreed in this, that the change might take place *without injury to trade.*

Reason, and those sound principles which experience teaches us all in the common affairs of life, might have led us to this conclusion. But reason and principle must be supported by evidence, and justified in practice, before they are allowed to govern! We have not yet courage to rely on arriving at sound results from sound premises; but in such transactions as I have been considering, in dealing with, and trusting one another, one would have supposed that the almost instinctive principles of self-interest and love of gain might have been left to guide us, and that

the law might have reserved its terrors and its encouragements for occasions in which our interests and our habits were less active and less known.

It is, however, perhaps of importance to show, that in these opinions I am supported by competent authority, and that I am not merely relying upon sound principles and common sense. I refer, therefore, to a petition presented to the House of Commons in 1833, from the city of Glasgow. It is printed at length in M'Culloch's Dictionary, article "Credit;" and, with the article itself, well deserves perusal. It was most respectably signed by merchants, manufacturers, and bankers.—"They were of opinion, "that in so far as these laws give creditors the "power to imprison debtors for small sums, such as "8*l.* and under, they are not only injurious to the "public, and *ruinous to the debtor*, but even hurtful to the creditor himself." To remedy these "evils," it was submitted that means should "be "adopted for the repeal of the laws now in force, "in so far as they sanction the recovery of small "debts by imprisonment."

Since this petition was printed, a bill has passed for abolishing, in Scotland, imprisonment for civil debts of small amount. It enacts, that after the 1st of January, 1836, no person shall be imprisoned for any debts not exceeding 8*l.* 6*s.* 8*d.* exclusive of interest and expenses, except under

contracts made before this act; and sheriffs and magistrates may direct the discharge of any person imprisoned for a less amount.

A petition on such a subject and from a city of so highly commercial a character as Glasgow, followed as it has been by the bill I have mentioned, presents firm practical grounds on which to call for a measure founded upon similar principles for the rest of the kingdom, and which, I trust, we shall speedily see enacted.

On this subject I may in passing quote a passage from a little work full of interesting information, "Wade's History of the Middle and Working "Classes," and which bears directly upon the point under consideration. Speaking of the bad economy of the poor, the author describes the various ways in which they suffer; and amongst others, he says, they are injured "by a trumpery system of "credit, fostered by those nuisances called Small-"debtor courts, which are a real injury to *buyers* "*and sellers*, fill the gaols, demoralize the poor, and "spread hate and revenge in every neighbourhood. "For the misfortune or the folly of being one week "behind in expenditure, and being necessitated "to resort to one shopkeeper during the week, "and who must be paid in whole, or in part, on "Saturday night, the poor pay, perhaps, thirty "per cent. more than the rich in all they con-"sume. The retailer is not to blame for this; "he must be paid for his extra trouble in weighing

"small quantities. It is also necessary that the "extra profit laid on those who do pay, should "make up his losses by those who do not,—a "system, by the way, of taxing the just for the "unjust, and chiefly favourable to practitioners in "insolvent courts, and the dissolute and wasteful, "who are sheltered and encouraged in extra- "vagance by the facilities the credit system "affords."

LETTER VI.

I WILL now offer a few observations on Sir John Campbell's Bill for the Abolition of Arrest for Debt. I shall confine myself to a general description of its leading provisions, and its probable utility to trade, and to society generally. It is no part of my plan to consider the details of the Bill technically, neither am I the proper person to do so. As I have principally considered the question in a practical and commercial point of view, and its bearing upon the interests of trade generally, I shall continue to regard the Bill in this point of view, though I am of opinion that a far higher ground might be taken upon the general principle of the Bill, which deserves, as Sir Samuel Romilly has said, consideration as an important measure in reference to our domestic policy.

I have endeavoured to show that the reliance placed on arrest for debt as a check on fraud and improvidence, or as a "specific test" of a

debtor's solvency, or lastly, as a power given to creditors and *necessary* for the maintenance of credit, is altogether unsupported by experience, and that, for these ends, it has signally failed. I have shown from the evidence of practical men, of unquestionable authority, that when creditors have obtained judgment on a debt, they do not resort to an arrest of the person, but, in almost all cases, they issue an execution against the property of their debtors, subject to the risks and inconveniences they are liable to in the present state of the law; and that they do not resort to the arrest of the person, though the advocates of arrest rely on that process as being the cheapest, the most efficacious, and *the mildest* means of enforcing payment. I have also stated that the majority of those now in gaol are in great indigence, and are finally discharged under the Insolvent Act, without any advantage to the creditors, and at an expense to the public.

I have taken this lower ground of objection to imprisonment for debt, because its abolition is opposed in consequence of a belief in its practical utility and necessity in our "artificial state" of society, as it is called; a phrase, I must say, too frequently sounded in our ears, without any very intelligible meaning in itself, but effective in raising fear and prejudice in the resistance to wholesome changes upon sound and clear principles, and a ready answer to the demands now univer-

sally making for the investigation and improvement of the economy of our social system.

Unquestionably the present law of debtor and creditor ought to be considered on higher grounds than those upon which I have attempted to consider it. The time, I am convinced, is not far distant, when it will be viewed as a source of moral poison infecting society to a lamentable extent. Its injustice is indefensible; experience demonstrates the false principles upon which it is founded; its intention is to check the prodigal and the spendthrift, and to punish the fraudulent debtor, but it does neither the one nor the other. The spendthrift it protects,—the fraudulent debtor successfully eludes its provisions! It seeks to accomplish its end through fear and intimidation; and it fails, as all legislation will fail, if founded upon such a principle. In fine, in the language of Sir Samuel Romilly, whose speeches on this subject I have often quoted, and to which I cannot too often refer—"while it screens the freehold "estate of the idle, the dissipated, or dishonest "debtor, it gives up the person and property "of his perhaps struggling creditor to all the "fatal consequences of some unforeseen vicis- "situde of trade,—the little he had, his all, to "bankruptcy,—and himself, to the moral and "physical contagion of gaol!" Consistently however with the view I have taken of the sub-

ject, I shall confine my notice of the Bill for effecting a radical change in this law, rather to the intentions and object of its framer than to its technical and professional provisions; and I should still do so at the present time even were I competent to discuss them.

Sir John Campbell's Bill, then, is intended to facilitate the recovery of debts by a more *direct* and summary proceeding against a debtor's property, of every description, than has yet been afforded by the law. It wholly discards the *indirect* means, by personal incarceration, of arriving at a knowledge of a debtor's solvency or insolvency. A debtor is no longer to be considered a criminal until he is proved to be such, and then imprisonment and *hard labour* is made the punishment of his delinquency. No debtor will be able any longer to conceal property with impunity; no creditor will longer be able to grasp it unduly; a judge is placed between these parties, and the honest debtor has every facility to make a surrender of his property for the equal benefit of his creditors, which is taken under legal control, and divided, with little risk of future litigation, under judicial sanction.

The Bill may be divided into four portions, every part of which is of great importance, to traders more especially, of every description and extent. For the recovery of any debt that is due, the proceeding is in the nature of a summons, by

which the party is brought before the court within ten days, and must either give security for the debt and costs, or show sufficient cause, on oath why final judgment should not be signed against him. The debtor may be examined in open court as to his property, every description of which is thus fairly made liable for his debts. If final judgment is obtained and signed against him, and the debt remains unliquidated until the twenty-second day after it is signed, the debtor, being a trader, commits an act of bankruptcy, which is intended as an equivalent for that act of bankruptcy now obtained by the imprisonment of a debtor. A trustee may be appointed, to whom the whole, or any part of a debtor's property, may be assigned for his creditors; and he is required forthwith to proceed to realize and distribute it.

The Court is similar to any one of the Courts of Commissioners under the Bankruptcy Act, sitting daily, to protect alike the interests of creditors and debtors, and with ample powers to enforce its decisions without delay, and, by the provisions of the Bill, without needless expense.

The Court moves only at the instigation of *the creditor*, unless by the voluntary cession of the debtor, whilst, at the same time, its judicial character is the best security of the latter. He can never complain of being brought before it, because he can only be summoned upon a debt *sworn to be due.*

In conjunction with the power of summoning and examining the debtor, must be considered the severe penalties attached by the Bill to the fraudulent proceedings of debtors. Falsifying accounts, or falsifying and mutilating books, concealing property, and obtaining goods under false pretences, are considered as crimes, and are to be punished as such, on conviction, by imprisonment and hard labour.

The second division of the Bill relates to the management of the estates of insolvents who voluntarily surrender their property. It proceeds on a principle recognised by the legislation of other countries, and familiar to Scotland—*viz.* the *Cessio Bonorum;* by which a debtor, by the *bonâ fide* surrender of his property, is entitled to liberty, and discharge from his obligations. Here many of the provisions and the penal part of the Bill afford more protection against fraud and dishonesty than the law has hitherto done, and also facilitates compositions of debts. A majority of three-fourths in number and value of creditors present, and specially summoned, at the *second* meeting for the purpose, enables the Commissioner to dismiss the petition of the petitioner, and to bind the creditors generally to the arrangements so adopted at the meeting. In this part of the Bill, the provisions of the bankrupt laws, with which the commercial public is familiar, are extended to cases of general insolvency; and hence, to the

creditor, is given additional power and facility for the discovery and detention of property.

The third portion of the Bill is occupied by enactments relating to trust-deeds, which, though perhaps the least valuable part of the Bill, is nevertheless much desired by many eminent mercantile and legal authorities on such matters. But I conceive the value now set upon winding up an estate by a deed of trust is rather founded upon a recollection of the dilatoriness and costliness of proceedings under the old bankruptcy system than upon any difficulty or expense in the present system; and I therefore think that *merchants* will rarely resort to this mode of settling estates, when the new court of bankruptcy is better understood, and when, should this Bill pass, the clauses facilitating a *Cessio Bonorum* are a part of the law of the land.

The other portion of the Bill is occupied with clauses relating to the legal machinery for working the Bill, which, as far as an unprofessional person can form an opinion, appears well adapted to its purpose, and promises to be less costly in its working than the present. It is proposed to establish, throughout the country, courts to be presided over by a barrister of a certain standing, simply for the recovery of debts; and it is difficult to conceive how, under even an extravagant system of remuneration (it should be ample, in order to secure efficient Commissioners) the

expense thus incurred can exceed one half of the expense now annually paid for the working of our present system; which, in the Report of the Commissioners, is estimated at *not less* than 300,000*l.* per annum. By others it has been estimated still higher.

Amongst the objections taken to this plan, was one which comes with rather a bad grace from those who maintain the right, and deny the injustice of arrest on mesne process. Trial by jury, it was said, was set aside. But as both the imprisonment and discharge of an individual is at this moment permitted, without the intervention of a jury, and without exciting the slightest alarm on the part of those who so eagerly oppose this Bill, I am not disposed to respect the objection. There is ample provision in the Bill for the reservation of such points of law as may and will arise in the course of proceedings before the Commissioners. Parties are allowed to appeal, though there are checks provided against merely litigious appeals, by the necessity of giving security for costs; and, on the part of debtors, by consequent imprisonment, on its appearing that actions at law, or suits in equity, have been vexatiously instituted.

I have thus touched upon the leading principles of the Bill; and I venture to say, that a more really important measure was never proposed to the people of this country.

In conclusion, I have only to add, that I trust what I now submit to the public will be considered in reference to the object I have in view, *viz.* to procure discussion on the value of the present law of debtor and creditor to the trade of the country, as compared with the Bill proposed to alter it, or any bill proceeding on the same principle, rather than in reference to the manner in which I have ventured to offer my opinions on the subject. It is very far from being exclusively a legal subject, or, as I have said, I should not have presumed to express my opinions upon it. I conceive its general principles are such as may fairly be discussed by unprofessional persons, which is clearly shewn by the inquiries of the Commissioners, both here and abroad, being directed to unprofessional as well as to professional men.

I also venture to hope that these few observations, superficial as they necessarily are, on account of many other claims upon my time, will obtain some attention to the Bill in question, and lead to its general principles being better understood by their being more generally considered and discussed.

Worthing, Oct. 1, 1835.

CHRIST CHURCH, SURREY.

The Report of the Committee appointed on the 9th of February, 1835, "*for the purpose of carrying into "operation* a Loan Bank, *upon the principle of those "established at Bristol, Bath, Tunbridge Wells, &c. "with power to add to their number, and to report "their proceedings to a General Meeting of the Sub-"scribers at the end of nine months.*"

The first weekly meeting was held on the 3d of March, and the meetings have continued to the present time. There has been always, except on three occasions, an attendance of one or more of the Committee; and ever since the 28th of July, the Assistant Overseer has regularly attended the weekly meetings, to give information as to the parties applying for Loans.

The Committee further report that during this period, and up to and including the 1st day of December instant, they have had 76 applications for Loans, 31 of which they have refused, 11 remain for further consideration, and they have granted the remaining 34, as follows:

	£
19, at £5 each, amounting to . . .	95
5, at £3	15
7, at £2	14
3, at £1	3
34, making a total amount advanced of	£127

Of these Loans, 18 were borrowed for the purpose of purchasing Stock, or otherwise for assisting in trade, 9

for the purpose of paying off rent and taxes, 1 for paying debts, 1 for purchasing furniture, 1 for clothes, 1 for apprenticing a child, 2 for expenses of a wife's illness, and 1 for redeeming goods in pawn.

All the Loans were made to persons residing, and who appeared upon inquiry to have settlements in this parish; but of the 31 applications which were rejected, there were 19 from persons living in the parish, (and most of them housekeepers,) but who had no legal settlement in the parish, and therefore their applications were not entertained.

Inquiries have been always made by the Assistant Secretary about the persons applying for Loans and their proposed securities, unless the parties were sufficiently known to the Committee or the Assistant Overseer: and the Committee have the great satisfaction of reporting, *that there is not now a single arrear of any instalment*, and, except in three instances, there has not been a default in punctual payment of any weekly instalment.

There have been 17 Loans paid entirely up, and the total amount received from the re-payment of Loans up to and including the first day of December, is 102*l.* 8*s.* 0*d.* and for interest thereon the sum of 1*l.* 5*s.* 9*d.*; and the amount still out, and in the course of payment, is 24*l.* 12*s.* 0*d.*

The Expenses incurred by the Committee are as follows, viz: For the Salary of the Assistant Secretary up to the first of December £9 0 0

And for printing and posting Bills . . 3 8 6

Making a total of 12 8 6

From which may be deducted the amount of Interest received as above 1 5 9

Leaving to be provided for . £11 2 9

The Committee beg to add, that although they cannot form any accurate estimate of the benefit afforded by these Loans, they are enabled, from the acknowledgments from time to time made by the parties on coming to pay their instalments, to assure the Subscribers that such benefits have been very considerable.

The Committee refer the Subscribers, for a detail of their proceedings, to the following Books which they have kept, viz:—The Minute Book of their proceedings—the Book containing the account of each Borrower's repayment, with the particulars of the Loan—and the Book containing the result of the inquiries made as to persons applying,—and to the printed Form of Memorandums signed by the parties, and the Card given them to have their repayments entered in.

The Committee, in conclusion, beg leave to recommend that the Loans should be extended to the inhabitants of the parish generally, giving a preference to those who have settlements.

B. HAWES, JUN. *Chairman.*

December 1st, 1835.

R. CLAY, PRINTER, BREAD-STREET-HILL.